



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 17 | Number 2

Article 6

Spring 1992

Direct Effect Jurisdiction in the 90's: Weltover, Inc. v. Republic of Argentina and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976

Matthew Patrick McGuire

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Matthew P. McGuire, *Direct Effect Jurisdiction in the 90's: Weltover, Inc. v. Republic of Argentina and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976*, 17 N.C. J. INT'L L. & COM. REG. 383 (1992).

Available at: <http://scholarship.law.unc.edu/ncilj/vol17/iss2/6>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Direct Effect Jurisdiction in the 90's: Weltover, Inc. v. Republic of Argentina and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976

Cover Page Footnote

International Law; Commercial Law; Law

Direct Effect Jurisdiction in the 90's: *Weltover, Inc. v. Republic of Argentina* and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976

I. Introduction

Sovereign immunity has been, for many years, a confusing and poorly defined area of both American and international law. For decades, the granting of sovereign immunity to foreign nations and their agents was essentially a political choice rather than a judicial exercise.¹ Congress altered the United States' approach to sovereign immunity by enacting the Foreign Sovereign Immunities Act of 1976 (FSIA).² During the fifteen years since the FSIA became law, numerous courts have struggled to interpret the statute, with varying degrees of success. In *Weltover, Inc. v. Republic of Argentina*,³ the Second Circuit Court of Appeals addressed a significant question which remained unanswered: whether a foreign sovereign's default on a debt payable in the United States to a foreign plaintiff with few, if any, other contacts with the United States satisfies the statutory requirement of "caus[ing] a direct effect in the United States."⁴

In holding that the FSIA's requirements were satisfied and that the exercise of jurisdiction was proper, the Second Circuit established an expansive interpretation of the "direct effect" clause of the FSIA. This Note argues that the Second Circuit's interpretation of the "direct effect" clause in *Weltover* was too broad and overstepped the congressional intent behind the statute.⁵ This Note contends that the court's overemphasis on economic and public policy goals⁶ resulted in an overly simplistic application of a nebulous statute and produced a legal precedent having the potential to discourage foreign sovereigns from utilizing the United States as a financial outlet⁷

¹ See *infra* notes 45-51 and accompanying text.

² 28 U.S.C. §§ 1330, 1332(a)(2-4), 1391(f), 1441(d), 1602-1611 (1988).

³ 941 F.2d 145 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3476 (U.S. Jan. 10, 1992) (No. 91-763).

⁴ *Id.* at 151. See 28 U.S.C. § 1605(a)(2) (1988). See *infra* note 31 for the relevant text of the statute. The significance of this question is indicated by the fact that *Weltover* is the first major FSIA case the Supreme Court has granted certiorari to in nearly nine years.

⁵ See *infra* notes 76-95 and accompanying text.

⁶ See *Weltover*, 941 F.2d at 153.

⁷ See *infra* note 100 and accompanying text.

the very result the court in *Weltover* feared the most.⁸

II. The Facts of the Case

The origin of the dispute lies in Argentina's rapid accumulation of public and private foreign debt during the 1970's.⁹ Since Argentina's currency is not recognized as a valid medium of exchange on the international market, Argentina must utilize its reserves of U.S. dollars and other acceptable currencies to repay foreign debt. The country's worsening debt situation in the early 1980's caused Argentina's supplies of foreign exchange to dwindle. To combat this situation, Banco Central, the government run Central Bank of Argentina, adjusted the foreign exchange rates in 1981. This process severely devalued Argentina's currency.¹⁰

One result of the devaluation policy was that Argentine debtors had a harder time getting the foreign exchange necessary to repay their debts. Consequently, Banco Central implemented the Foreign Exchange Insurance Contract (FEIC) program. The purpose of this program was to provide private debtors with a means of obtaining foreign exchange at a rate minimizing the impact of the currency devaluations.¹¹

The FEIC program merely postponed the inevitable. In 1982, the year when FEIC contracts came due, Argentina lacked the necessary amount of U.S. dollars to repay all private debts. Argentina's response to this impending financial crisis was to refinance the debts by issuing bonds payable in U.S. dollars (Bonods), as well as promissory notes.¹² The Bonods provided for payment of the principal and interest in U.S. dollars on certain dates in 1986 and 1987.¹³ Payment was to be made in either New York, London, Frankfurt, or Zurich, at the election of each creditor.¹⁴ The three plaintiffs in this action all elected to receive payment in New York.¹⁵

⁸ See *Weltover*, 941 F.2d at 153.

⁹ *Id.* at 147.

¹⁰ *Id.*

¹¹ The beneficial exchange rate under the FEIC was based on the exchange rate in effect at the time the private debtor's contract was executed. Thus, Banco Central, rather than the private debtor, absorbed the brunt of the currency devaluation. *Id.*

¹² *Id.* at 148. Since only the Bonods are at issue in this case, the promissory notes will not be discussed in this Note.

¹³ *Id.* Interest on the Bonods was to be based on the annual London Interbank market rate for 180-day Eurodollar deposits. See *Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1203 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3476 (U.S. Jan. 10, 1992) (No. 91-763).

¹⁴ *Weltover*, 941 F.2d at 148. The Bonod program gave the creditor two options: 1) accept the Bonods in satisfaction of the original debt, which would release the original private debtor and substitute Argentina as the debtor on the Bonod itself; and 2) maintain the original debtor/creditor relationship with the private debtor and accept the Bonods as guarantees and Argentina as guarantor. *Id.*

¹⁵ *Id.* Two of the three plaintiffs in this action, *Weltover, Inc.* and *Springdale Enterprises, Inc.*, are Panamanian corporations. The third, *Bank Cantrade, A.G.*, is a Swiss

Like the FEIC program before it, the Bonods represented only a postponement of, rather than a solution to, Argentina's foreign exchange woes. Argentina's economic crisis worsened during the mid-1980's, and in May 1986, following Argentina's initial interest payments on the Bonods, Argentina's president directed the Ministry of the Economy to have Banco Central establish alternative methods of repaying foreign debt.¹⁶ Subsequently, Banco Central announced a unilateral rescheduling of payments on the Bonods and requested that plaintiffs participate in a "roll-over" of these obligations.¹⁷ Plaintiffs refused to acquiesce to Argentina's unilateral rescheduling and filed suit to enforce the terms of the Bonods.

In the trial that followed, Argentina moved to dismiss on three separate grounds: 1) lack of subject matter jurisdiction under the FSIA; 2) lack of personal jurisdiction; and 3) under the doctrine of *forum non conveniens*.¹⁸ The United States District Court for the Southern District of New York denied all three motions,¹⁹ and Argentina appealed to the Second Circuit Court of Appeals for a reconsideration of Argentina's FSIA subject matter jurisdiction claim.

The court of appeals considered two issues under the FSIA: "whether the act of a foreign sovereign in issuing debt instruments to foreign creditors for the stated purpose of controlling the nation's stock of foreign currency is 'commercial activity' within the meaning of the FSIA," and, if so, "whether [such an] action has a sufficient nexus with the United States to justify the exercise of subject matter jurisdiction over the foreign sovereign in an American court."²⁰ The court affirmed the district court's ruling, holding that Argentina's actions concerning the Bonods fell within the commercial activity exception to the FSIA,²¹ and additionally, that Argentina's default on the Bonods caused a direct effect in the United States, thus satisfying the FSIA's statutorily mandated nexus.²²

The court of appeals' analysis of the commercial activity exception to the FSIA is relatively straightforward. Noting initially that "Congress intended to grant a 'great deal of latitude' to the federal courts in distinguishing between commercial acts and sovereign acts,"²³ the court recognized that Congress nonetheless listed sev-

bank. *Id.* Weltover holds title to Bonods worth \$900,000, while Springdale holds title to \$200,000 worth of Bonods and Bank Cantrade holds title to Bonods totalling \$230,000. *Weltover*, 753 F. Supp. at 1203 n.1.

¹⁶ *Weltover*, 941 F.2d at 148.

¹⁷ 753 F. Supp. at 1204.

¹⁸ *Id.* at 1203.

¹⁹ This Note will address Argentina's subject matter jurisdiction claim, which was the only issue brought before the court of appeals.

²⁰ *Weltover*, 941 F.2d at 146-47.

²¹ *Id.* at 149-51. See 28 U.S.C. § 1605(a)(2) (1988).

²² *Weltover*, 941 F.2d at 151-53.

²³ *Id.* at 149 (citing H.R. REP. NO. 1487, 94th Cong., 2d Sess. 1, 16, reprinted in 1976 U.S.C.C.A.N. 6604, 6615 [hereinafter HOUSE REPORT]).

eral examples of activities falling within the definition of commercial activity if undertaken by a foreign sovereign. One such activity is a foreign government's "borrowing of money."²⁴

The court next considered the specific conduct giving rise to the lawsuit rather than focusing on the overall policy of which the individual transaction was but a part.²⁵ In this case it would be easy to look at Argentina's broad-based foreign exchange regulation policy as the relevant conduct, but such an approach would virtually ignore the individual transaction (the issuance of the Bonods) which precipitated this lawsuit. As the court stated, "[t]o imbue each transaction with a sovereign character simply because it is part of a broader governmental scheme would run afoul of the FSIA's restrictive theory of foreign sovereign immunity."²⁶ Were a court to focus on the broader scheme rather than an individual part of it, the court would be analyzing that activity's purpose rather than its nature, and this would contradict the FSIA's mandate to refer to the nature of an activity, not its purpose, when distinguishing commercial acts from sovereign ones.²⁷

In analyzing Argentina's issuance of the Bonods, the court of appeals quickly concluded that this act was commercial rather than sovereign.²⁸ The Second Circuit had explicitly held in a recent case that "[i]t is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2)."²⁹ Thus, "[b]ecause defendants' [Argentina's] issuance of public debt—the Bonods—immersed them in the stream of international commerce in foreign currency, the nature of that act was commercial; there was nothing uniquely sovereign about this activity."³⁰

The court of appeals likewise conclusively rejected Argentina's claims that its commercial acts did not cause a direct effect in the

²⁴ HOUSE REPORT, *supra* note 23, at 6615.

²⁵ *Weltover*, 941 F.2d at 150 (citing *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989), and *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

²⁶ *Id.* (citing HOUSE REPORT, *supra* note 23, at 6605 (foreign sovereign immunity limited to public acts of the sovereign)).

²⁷ *Id.* See also 28 U.S.C. § 1603(d) (1988) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.")

²⁸ The court of appeals construed the FSIA to mean that an activity is commercial if it is one in which a private person could engage. *Weltover*, 941 F.2d at 149 (citing *Texas Trading*, 647 F.2d at 309). One basis for the court's determination in this case is that the issuance of debt instruments such as the Bonods is an activity that fits this description. *Id.* at 151.

²⁹ *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) (involving negotiable promissory notes issued by the Bolivian government). See also *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) (per curiam) (Russian Imperial Government's issuance of public debt in 1916 would have been commercial activity had the FSIA been in effect at the time), *cert. denied*, 487 U.S. 1219 (1988).

³⁰ *Weltover*, 941 F.2d at 151.

United States.³¹ The court's analysis of this issue focused on two essential questions: whether the effect was sufficiently "direct" and whether it was sufficiently "in the United States" such that "Congress would have wanted an American court to hear the case."³² The court placed considerable emphasis on congressional intent in its analysis, mainly because an exact interpretation of the "direct effect" clause is impossible. In its 1981 *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*³³ decision, the Second Circuit noted that interpreting the statute was "an enterprise fraught with artifice."³⁴ Due to this statutory uncertainty, courts interpreting the "direct effect" clause should remain mindful of the congressional intent behind the FSIA, which generally is to open American courts to "those aggrieved by the commercial acts of a foreign sovereign."³⁵

The court's analysis of the "directness" of the Bonod's effect was brief: because Argentina's unilateral rescheduling of the Bonods deprived the three plaintiffs of their contractual right to be paid in U.S. dollars, Argentina's acts caused a direct effect to plaintiffs.³⁶

The second question the court considered, whether the effect was sufficiently "in the United States," posed more of a problem for the court to uphold jurisdiction under the FSIA. The crux of the problem in *Welltover* was that the three plaintiffs were foreign corporations with "few, if any, other contacts with the United States."³⁷ The court recognized that foreign plaintiffs are certainly affected (in a FSIA sense) in their place of incorporation or principal place of business, but held that to so limit a court's interpretation of the FSIA would be too simplistic and would effectively preclude many foreign

³¹ *Id.* at 151-53. See 28 U.S.C. § 1605(a)(2) (1988). This statute states:

a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

Id. (emphasis added).

³² *Welltover*, 941 F.2d at 152 (quoting *Texas Trading*, 647 F.2d at 313).

³³ 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

³⁴ *Id.* at 312.

³⁵ *Id.* The four specifically enumerated goals of the FSIA were: 1) to codify the "restrictive" principle of sovereign immunity; 2) to insure that this theory of sovereign immunity is applied by American courts in litigation involving foreign sovereigns; 3) to provide a statutory basis for "making service upon, and obtaining in personam jurisdiction over" a foreign sovereign; and 4) to assist plaintiffs who have obtained a judgment against a foreign sovereign. HOUSE REPORT, *supra* note 23, at 6605-06.

³⁶ The court's two-part reasoning was simple: "Where the plaintiff is a corporation, 'the relevant inquiry under the direct effect clause . . . is whether the corporation has suffered a 'direct' financial loss.'" *Welltover*, 941 F.2d at 152 (quoting *Texas Trading*, 647 F.2d at 312). And when, as occurred in this case, "the breach of an agreement deprives the corporate plaintiff of capital to which it is lawfully entitled there is a direct financial loss to the plaintiff." *Id.*

³⁷ *Id.*

plaintiffs from seeking relief under the "direct effect" clause.³⁸

Instead, the court chose to base its direct effect analysis on the place where the "legally significant acts giving rise to the claim occurred."³⁹ In this case the legally significant act was the failure to make payment on the Bonods in New York, where plaintiffs chose to receive payment. Thus, the court reasoned, the direct effect was in New York and satisfied the statutorily mandated nexus of the FSIA.⁴⁰

Supporting the *Weltover* court's analysis of this transaction's "directness" and its effect "in the United States" is a strong public policy concern: protecting the reputation of New York City as an international commerce center.⁴¹ The reasoning behind this public policy justification is simple: New York, and thus by implication the United States and its courts, has an interest in protecting the rights of foreign corporations and individuals who rely on New York's reputation to transact business there. If foreign businessmen and corporations are unable "to protect their rights in business transactions conducted in New York they will look elsewhere."⁴² This policy argument is significant because it relates to the question courts must ask when interpreting the FSIA: would Congress have wanted an American court to hear such a case? The *Weltover* court held that public policy concerns, combined with the satisfaction of the "direct effect" nexus, required an affirmative answer to that question.⁴³

III. The Prior History of "Direct Effect" Law in the U.S.

The House Committee on the Judiciary defined sovereign immunity as: "a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued)."⁴⁴ Most of the statutory devel-

³⁸ *Id.* ("Were [interpretation of the FSIA] so limited, it would be the rare instance in which any foreign plaintiff could be said to suffer a direct effect in the United States.").

³⁹ *Id.* (citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (legally significant act giving rise to litigation occurred in Saudi Arabia, and thus denial of jurisdiction was proper)).

⁴⁰ The court bases this aspect of its holding largely on *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114 (S.D.N.Y. 1988), in which a district court held that "nonpayment of a debt payable in the United States to a foreigner . . . does cause a direct effect in the United States." *Id.* at 121. However, the district court's holding in *L'Europeenne de Banque* was based primarily on public policy concerns such as those discussed in *Weltover*; thus, there is no substantive precedent behind the *Weltover* court's analysis - it merely echoes the public policy beliefs of a lower court in a factually similar case.

⁴¹ *Weltover*, 941 F.2d at 153.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ HOUSE REPORT, *supra* note 23, at 6606. The doctrine of sovereign immunity was first recognized by American courts in *The Schooner Exchange v. M'Fadden*, 7 Cranch 116 (1812), in which Chief Justice John Marshall "upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations." HOUSE REPORT, *supra* note 23, at 6606.

opment of foreign sovereign immunity in the United States is recent. Prior to the enactment of the FSIA in 1976, sovereign immunity was more of a diplomatic concept than a judicial one. In the nineteenth century, recognizing sovereign immunity was proper because that was the law and practice of most nations.⁴⁵

In the first half of this century, traditional practices became less important, and the will of the executive branch, as executed by the State Department, often determined whether courts granted sovereign immunity.⁴⁶ Foreign nations usually asked the State Department to intervene in the judicial process, and courts invariably respected the wishes of the State Department officials. In the mid-1940's, the Supreme Court actually held that judicial deference to such requests was mandatory.⁴⁷

As the number of potential disputes between American entities and foreign sovereigns grew, however, even the State Department recognized that an alternative approach was needed. Consequently, the State Department adopted a restrictive principle of sovereign immunity in an interdepartmental correspondence known as the Tate Letter.⁴⁸ This letter stated that a foreign sovereign defendant would be held accountable in American courts for disputes arising out of commercial or private acts.⁴⁹

Although the Tate Letter may have represented a willingness on the part of the State Department to adopt a more judicial and less diplomatic approach to evaluating immunity claims, the practical reality of the matter was that the State Department was a political body administering a judicial doctrine,⁵⁰ and could still decline to recommend that courts exercise jurisdiction over a foreign sovereign defendant because of diplomatic concerns.⁵¹

Congress enacted the FSIA in 1976 to codify the restrictive view of sovereign immunity⁵² by "provid[ing] when and how parties can

⁴⁵ See *supra* note 44.

⁴⁶ HOUSE REPORT, *supra* note 23, at 6606. See Lorna G. Schofield, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 476-77 (1980) (noting that before adoption of the FSIA, the State Department played a significant role in the determination of whether American courts should hear certain claims against foreign sovereigns).

⁴⁷ HOUSE REPORT, *supra* note 23, at 6606. See *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945).

⁴⁸ Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952), in 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter].

⁴⁹ *Id.* at 984-85.

⁵⁰ HOUSE REPORT, *supra* note 23, at 6607. The State Department was further handicapped by the fact that it was not equipped to "take evidence, to hear witnesses, or to afford appellate review." *Id.*

⁵¹ "A private party . . . cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State." *Id.*

⁵² According to this theory, a foreign sovereign's immunity is "restricted" or limited

maintain a lawsuit against a foreign state or its entities in the courts of the United States,"⁵³ and to assure "litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process."⁵⁴

The FSIA begins with a premise of sovereign immunity⁵⁵ and then carves out various exceptions, among the most significant of which are the commercial activity exceptions of section 1605(a)(2).⁵⁶ A unique aspect of the FSIA is that it "automatically" confers personal jurisdiction over a sovereign state in actions brought under sections 1605-1607 of the Act, as long as service of process is made properly under section 1608⁵⁷ and traditional notions of due process are not offended.⁵⁸ More precisely stated, sections 1605-1607 of the

to claims involving the sovereign's public acts. Such immunity does not extend to the sovereign's commercial or private acts. *Id.* at 6605.

⁵³ *Id.* at 6604.

⁵⁴ *Id.* at 6606. Congress wished to make certain that "sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency." *Id.*

⁵⁵ 28 U.S.C. § 1604 (1988) reads: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

⁵⁶ 28 U.S.C. § 1605(a)(2) (1988). Since this note concerns only one of the commercial activity exceptions to the FSIA the other exceptions will not be discussed. These exceptions include: explicit or implicit waiver of immunity, § 1605(a)(1); actions concerning property in the United States, § 1605(a)(3), (4); actions involving money damages sought for personal injury or death, or damage to or loss of property, occurring in the United States, § 1605(a)(5); and actions involving suits in admiralty brought to enforce a maritime lien based upon a commercial activity of the sovereign state, § 1605(b).

⁵⁷ The relevant statute states:

a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330(a)-(b) (1988). See *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980).

⁵⁸ See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) ("[T]he Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant."), *cert. denied*, 454 U.S. 1148 (1982). See also *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process clause preclude the assertion of personal jurisdiction over them."), *cert. denied*, 493 U.S. 891 (1989); *Gonzalez Corp.*, 614 F.2d at 1255 ("Personal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard.").

The court in *Texas Trading* held that due process scrutiny involves four distinct inquiries to determine whether "maintenance of the suit . . . offend[s] 'traditional notions of fair play and substantial justice.'" *Texas Trading*, 647 F.2d at 314 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). These inquiries are "the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of

FSIA require some nexus between the defendant and the United States or a waiver of immunity; the language of these provisions inherently "prescribes the necessary contacts which must exist before [American] courts can exercise personal jurisdiction."⁵⁹

Despite the fact that section 1330(b),⁶⁰ in conjunction with the "direct effect" clause of section 1605(a)(2), "provides, in effect, a Federal long-arm statute over foreign states,"⁶¹ for several years following the passage of the FSIA courts declined to assert jurisdiction over foreign sovereigns.⁶² It was not until 1980 that a federal court upheld jurisdiction under the FSIA based on the "direct effect" clause. In *Decor by Nikkei International, Inc. v. Federal Republic of Nigeria*,⁶³ a New York district court held that an anticipatory breach of a cement contract by Nigeria caused a direct effect in the United States, and thus exercising jurisdiction was proper.⁶⁴

Nikkei was consolidated on appeal with several other disputes arising out of the same series of transactions, and the resulting case, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,⁶⁵ became

litigating in the United States, and the countervailing interest of the United States in hearing the suit." *Id.* See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 297 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84, 97-98 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *International Shoe*, 326 U.S. at 316.

The general ramifications of minimum contacts standards on "direct effect" jurisdiction exceed the scope of this Note and will not be discussed. For a more extensive treatment of this issue, see Philip D. Wheeler, Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U. J. INT'L L. & POL. 571, 599-607 (1981).

⁵⁹ See HOUSE REPORT, *supra* note 23, at 6612 ("The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision."). See also *Texas Trading*, 647 F.2d at 308 ("The Act . . . makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction.").

⁶⁰ See *supra* note 57 for the pertinent part of the statute.

⁶¹ HOUSE REPORT, *supra* note 23, at 6612.

⁶² See, e.g., *Gonzalez Corp.*, 614 F.2d at 1254 (defendant did not have sufficient minimum contacts with the forum); *Carey v. National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir. 1979) (defendant oil company's failure to deliver oil did not cause a "direct effect in the United States," as "there was no real entering of the marketplace in the United States"); *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1298-99 (S.D.N.Y. 1980) (no personal jurisdiction over defendant under any of the three commercial activity exceptions to FSIA), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979) (death of American citizen in Moscow hotel did not cause direct effect in the United States); *East Eur. Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 390 (S.D.N.Y.) (telexes comprising the negotiations between plaintiff and defendant do not constitute "activity having a 'direct effect' in the marketplace of the United States"), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978) (no "direct effect in the United States" as a result of injuries suffered by American citizens in an Iranian airport), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

⁶³ 497 F. Supp. 893 (S.D.N.Y. 1980), *aff'd*, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

⁶⁴ *Id.* at 906. For a thorough analysis of *Nikkei* and the conflicting district court decisions in two other Nigerian cement dispute cases (*Texas Trading* and *Verlinden*), see J. Blair Richardson, Jr., Note, *The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act*, 4 FORDHAM INT'L L.J. 109 (1980).

⁶⁵ 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

the seminal Second Circuit decision on the interpretation the "direct effect" clause of the FSIA. Recognizing initially that the "direct effect" clause was "somewhat abstruse,"⁶⁶ the Second Circuit Court of Appeals went on to hold that when the plaintiff is a corporation, a "direct effect" occurs when the corporation suffers a "direct financial loss."⁶⁷ The court further held that the direct effect in *Texas Trading* was sufficiently "in the United States" because the plaintiffs were American corporations "who were to present documents and collect money in the United States."⁶⁸ The *Texas Trading* court explicitly left open the question of "whether a failure to pay a foreign corporation in the United States . . . creates an effect 'in the United States' under § 1605(a)(2)" ⁶⁹

The significance of the *Texas Trading* decision lies not in its interpretation of the terms "direct" and "in the United States," but rather in the court's holding that courts construing the "direct effect" clause should not rely too heavily on past judicial interpretations of the clause. Instead, courts must "be mindful more of Congress' concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign No rigid parsing of § 1605(a)(2) should lose sight of that purpose."⁷⁰

Yet Congress evinced no clear intent with regard to specific application of the FSIA, and therein lies the difficulty that courts have encountered since the FSIA's enactment. The House Report on the FSIA⁷¹ provides few, if any, clues as to how courts are to apply the Act, and some aspects of the House Report are disputed. For example, the House Report states that an exercise of jurisdiction under the "direct effect" clause must be "consistent with principles set forth in section 18, Restatement of the Law, Foreign Relations Law of the United States (1965)."⁷² The court in *Texas Trading* reasoned that such a guideline did not make sense because section 18 "concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts" ⁷³ While the Second Circuit steadfastly refuses to apply this Restatement provision to "direct effect" cases, other circuits often look to it for guidance despite its

⁶⁶ *Id.* at 311.

⁶⁷ *Id.* at 312.

⁶⁸ *Id.*

⁶⁹ *Id.* This is the issue addressed by the court in *Weltover*.

⁷⁰ *Id.* at 312-13.

⁷¹ See *supra* note 23.

⁷² HOUSE REPORT, *supra* note 23, at 6618. Section 18 requires that an effect be "substantial" and "occur[] as a direct and foreseeable result of the conduct outside the territory." For the relevant text of this Restatement provision, see *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110 n.26 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

⁷³ *Texas Trading*, 647 F.2d at 311.

vagueness.⁷⁴

While the first few years following enactment of the FSIA saw courts reluctant to grant jurisdiction, after *Texas Trading*, courts took a more balanced and reasoned approach to applying the doctrine of foreign sovereign immunity.⁷⁵ Thus, the state of the law regarding the "direct effect" clause leading up to *Weltover* was still in flux, and the question addressed by the court of appeals was truly one of first impression.

IV. The Impact of *Weltover* on "Direct Effect" Jurisprudence

A. *Locus of Injury Analysis*

An initially troublesome aspect of the Second Circuit's decision in *Weltover* is the brief, matter-of-fact way in which the court considered a question of first impression.⁷⁶ The court's analysis of whether the issuance of the Bonods was a "commercial activity" within the meaning of the FSIA is clear and virtually indisputable given past judicial holdings and the express declaration of Congress that a foreign government's borrowing of money constitutes a commercial activity.⁷⁷ Similarly, the court's conclusion that, "pursuant to the

⁷⁴ See *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798 (9th Cir. 1989) (requiring that a foreign sovereign's activities cause a substantial and foreseeable effect in the United States to abrogate sovereign immunity); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) ("to support jurisdiction under the FSIA the domestic effects of a foreign state's actions must be 'substantial' and 'direct and foreseeable'"), *cert. denied*, 493 U.S. 937 (1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988) ("[a]n effect is 'direct' in the sense that it is the direct and foreseeable result of the conduct outside the United States"); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 417 n.15 (5th Cir. 1987) (noting the applicability of the FSIA and the "substantial" and "direct and foreseeable" standards of section 18 of the Restatement of Foreign Relations to commercial contexts), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees*, 693 F.2d at 1110-11 (Congressional intent and the similar functions of section 18 of the Restatement and the direct effect clause of the FSIA provide basis for looking to the Restatement for guidance); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (applying "substantial" and "direct and foreseeable" standards to commercial dispute).

⁷⁵ Notable cases in which courts exercised jurisdiction over a foreign sovereign under the FSIA include: *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) (Bolivia subject to suit on a negotiable promissory note under the "commercial activity" exception of the FSIA); *Rush-Presbyterian*, 877 F.2d at 574 (Greek government's execution of a contract was a "commercial activity" and therefore defendants were not entitled to sovereign immunity); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (case dismissed under the act of state doctrine, but court found jurisdiction under the FSIA); *Harris Corp.*, 691 F.2d at 1344 (letter of credit arrangement caused significant, foreseeable financial consequences in the United States).

⁷⁶ The question of whether a foreign sovereign's default on a debt payable in the United States to a foreign plaintiff satisfies the statutorily mandated "direct effect" nexus of the FSIA was explicitly left open in *Texas Trading*, 647 F.2d at 312. Subsequently the District Court for the Southern District of New York held that such a default does cause a direct effect in the United States. *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 121 (S.D.N.Y. 1988). However, *Weltover* represents the first time that a court of appeals has ruled on this issue.

⁷⁷ HOUSE REPORT, *supra* note 23, at 6615; see *Shapiro v. Republic of Bolivia*, 930 F.2d

FSIA, a 'direct' effect may occur as the result of" a breach of contract is also incontrovertible.⁷⁸

However, in analyzing the situs of the effect of Argentina's default on the Bonods, the court was considerably less thorough. The cornerstone of the court's analysis on this point is the notion that "[a]n injury to a corporation occurs in some legally significant situs, for instance . . . a place designated for performance of a contract" ⁷⁹ In *Weltover* that was obviously New York, and the "in the United States" aspect of the "direct effect" clause was thus fulfilled.

The *Weltover* court recognized that a business' place of incorporation or principal place of business could also be the situs of a direct effect, but the court argued that to use this standard exclusively would drastically reduce the number of foreign plaintiffs who "could be said to suffer a direct effect in the United States,"⁸⁰ and presumably this result would contradict Congress' intent to open American courts to both foreign and domestic plaintiffs in suits brought under the FSIA. Thus, a broader standard was needed. This expansive interpretation of congressional intent is subject to criticism. Although Congress certainly intended to open American courts to parties injured by the commercial acts of a foreign state, there is no evidence that Congress intended for American courts to become a "clearing house" for every international financial dispute that has some marginal tie to the United States. The plaintiffs' minimal "presence" in New York indicates that no compelling American interests are implicated in this case.

Significant in the *Weltover* court's analysis was the holding in *L'Europeenne de Banque v. La Republica de Venezuela*⁸¹ that "nonpayment of a debt payable in the United States to a foreigner cause[s] a direct effect in the United States."⁸² A closer analysis of the *L'Europeenne de Banque* holding reveals, however, that the district court based its findings in that case on: 1) the fact that the United States Supreme Court, in *Verlinden B.V. v. Central Bank of Nigeria*, declared generally that foreigners could sue foreign states in American courts,⁸³ and 2) that certain public policy goals supported such a conclusion.⁸⁴

1013, 1018 (2d Cir. 1991); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) (per curiam), cert. denied, 487 U.S. 1219 (1988).

⁷⁸ *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), cert. granted, 60 U.S.L.W. 3476 (U.S. Jan. 10, 1992) (No. 91-763).

⁷⁹ *International Housing, Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 n.3 (2d Cir. 1989) (citing *L'Europeenne de Banque*, 700 F. Supp. at 121-22).

⁸⁰ *Weltover*, 941 F.2d at 152.

⁸¹ 700 F. Supp. 114 (S.D.N.Y. 1988).

⁸² *Id.* at 121; see *Weltover*, 941 F.2d at 153.

⁸³ 700 F. Supp. at 121 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-97 (1983)).

⁸⁴ *Id.* at 121-22. See *infra* notes 96-101 and accompanying text for a discussion of the public policy considerations involved in this case.

The Supreme Court's holding in *Verlinden* states only a general proposition — the specific terms of the FSIA must still be met for the exercise of jurisdiction to be proper. While such a general holding lends support to the contention of the district court in *L'Europeenne de Banque* and the court of appeals' holding in *Weltover*, it is by no means a direct, specific pronouncement of law upon which a court can base an expansive interpretation of an ambiguous statute. This leaves only public policy justifications to directly support this argument, a topic which will be discussed later in this Note.

Localizing the situs of a direct effect in the United States is "problematic" and "troublesome."⁸⁵ Various courts and commentators have all arrived at conflicting conclusions as to what standard to apply. In *Verlinden B.V. v. Central Bank of Nigeria*,⁸⁶ one of the few prior FSIA cases involving a foreign plaintiff, the district court noted that "courts have uniformly held that the locus of injury is dispositive of jurisdiction; indeed, that factor takes precedence over the citizenship of the victim."⁸⁷ However, the *Verlinden* court further held that the plaintiff, a Dutch corporation, felt the effect of the defendant's breach of contract not in New York, where the defendant repudiated the contract, but rather in Amsterdam, where the corporation was located.⁸⁸ The effect of the breach of contract in the United States was "at most speculative and remote."⁸⁹

Aside from *L'Europeenne de Banque* and *Verlinden*, virtually all of the other cases which interpret the "direct effect" clause involve plaintiffs who are American citizens or corporations,⁹⁰ or have factual differences which make them clearly distinguishable from *Weltover*.⁹¹ Therefore, the proper standard to apply is not evident. The *Weltover* court adopted a broad, far-reaching standard based on

⁸⁵ *Weltover*, 941 F.2d at 152.

⁸⁶ 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).

⁸⁷ *Id.* at 1298.

⁸⁸ *Id.* at 1298-1300. See also J. Blair Richardson, Jr., Note, *The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act*, 4 FORDHAM INT'L L.J. 109, 121 n.81 (1980) ("Presumably the [*Verlinden*] court reasoned that the plaintiff was injured not where its bank received news of the repudiation, but rather where it actually sustained the economic injury . . .").

⁸⁹ 488 F. Supp. at 1298.

⁹⁰ E.g., *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991); *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

⁹¹ See, e.g., *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989) (contracts sued on not payable in the United States; plaintiff was a foreign corporation whose losses occurred outside the United States); *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987) (personal injury case - no direct effect in the United States); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987) (same), *cert. denied*, 484 U.S. 1043 (1988).

legally significant events such as place of payment on a debt, whereas the district court in *Verlinden* utilized a narrower test based on where a corporation is physically located or incorporated. One commentator criticized the standard adopted in *Weltover* and suggested a different approach:

The place of performance . . . is unsatisfying as a forum [for locating financial injury]. The basis of effect jurisdiction is the state's interest in protecting those injured within its territory. It is thus not the failure of performance per se but the injury occasioned by the breach of a contractual duty that supports the exercise of effects jurisdiction under the [FSIA].⁹²

[T]o determine whether a corporation has sustained a direct effect within a particular state a court must inquire whether the corporation, by its activity vis-a-vis the potential forum state, sufficiently implicates that state's interest in protecting persons within its territory. In other words, a court must determine whether a corporation has sufficiently manifested itself within the state so that the loss sustained by the corporation as a whole may be deemed to have been sustained by an entity located within the state.⁹³

Arguably, under this more balanced standard, the plaintiffs in *Weltover* did not sufficiently manifest themselves in the state of New York so as to sustain financial injury there. Payment of the Bonods in New York was not contractually mandated from the beginning - the plaintiffs selected it from among four major international financial centers.⁹⁴ Granted, New York has a vested interest in protecting the contractual rights of those who opt to transact business there, but it is difficult to say that any of the three plaintiffs could be deemed to be "located" in New York.

This test implies a type of "minimum contacts" standard for plaintiffs, and in *Weltover*, the plaintiffs' only contact with New York (as far as the court was concerned) was their choice to be paid there. Whether this level of contact with the forum state satisfies the above mentioned test is not clear - a strict reading of the test may indicate that plaintiffs do not pass, but if public policy considerations are allowed to affect the evaluation, then the scales may tip in favor of the plaintiffs.⁹⁵ Regardless, this test is more logically oriented to the issue it addresses and is less simplistic than the test used by the *Weltover* court.

⁹² Lorna G. Schofield, Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 511 (1980).

⁹³ *Id.* at 512.

⁹⁴ In *Rafidain Bank*, the Second Circuit Court of Appeals held that subject matter jurisdiction did not lie under the FSIA, largely because "[p]ayment in New York City was not a contractual requirement." 893 F.2d at 12.

⁹⁵ Admittedly New York has a strong incentive and desire to protect any contractual relationships which involve New York. See *infra* notes 96-101 and accompanying text for a discussion of these public policy concerns.

B. Public Policy Concerns

Much of the force behind the holding in *Weltover* comes from the public policy argument that American courts should be open "to foreign plaintiffs so as to preserve or even enhance New York's status as a world financial leader."⁹⁶ This policy goal directly relates to what the *Weltover* court calls the "ultimate FSIA question: Would Congress have wanted an American court to entertain an action such as [the one in *Weltover*]?"⁹⁷

In answering this question affirmatively, the *Weltover* court noted that New York has a significant interest in protecting its reputation as well as those who choose to do business there, because "[i]f individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York they will look elsewhere."⁹⁸ The court does not hazard a guess as to where foreign business entities would go to conduct business should New York prove inhospitable, but fears of a mass economic desertion seem unfounded considering that New York is the international clearing center for U.S. dollars.⁹⁹ Additionally, New York prospered quite well when the courts were reluctant to exercise jurisdiction under the FSIA; thus, past empirical evidence discredits the *Weltover* court's reasoning.

The contrary line of thought, and one as equally persuasive as that espoused by the *Weltover* court, was enumerated by the district court in *Verlinden*:

Indeed, solicitude for New York's "preeminent financial position" should induce courts to forbear the exercise of jurisdiction in close cases. . . . It would not be unrealistic to suggest that foreign states, aware that the designation of American banks as advisors in letters of credit would in consequence subject them to in personam jurisdiction in the event of a claimed breach, would have little hesitancy or difficulty in designating banks in foreign lands. It could hardly have been the purpose of Congress to force the loss of such business upon the American financial community.¹⁰⁰

⁹⁶ *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3476 (U.S. Jan. 10, 1992) (No. 91-763). *See also* *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985) ("The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world.").

⁹⁷ *Weltover*, 941 F.2d at 153.

⁹⁸ *Id.*

⁹⁹ *Id.* The *Weltover* court recognized New York's preeminence as a financial center, but the court virtually ignored the significance of this fact when hypothesizing about the potential ramifications of not exercising jurisdiction in this case.

¹⁰⁰ *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983). *See also* *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112 (5th Cir. 1985).

By declining to exercise jurisdiction over foreign states where the activities in question . . . have an insufficient connection with the United States, the United States recognizes that its interest in providing a forum for litigation by aggrieved parties must often yield to the foreign state's interest in its inde-

One might say that the *Verlinden* court looked at the proverbial glass as "half-full" and that the *Weltover* court looked at the same glass as "half-empty." Each argument has merit, however, and it is not reasonable to completely dismiss one simply because one tends to agree with the other. Yet this is exactly what the *Weltover* court did: it presented the public policy side of the case as overwhelmingly in favor of exercising jurisdiction, presumably to capitalize on the "ultimate question" which seems to dominate interpretation of the FSIA.¹⁰¹

Were there substantial evidence that failing to exercise jurisdiction in a case such as *Weltover* would have a "chilling effect" on international commerce in New York, the *Weltover* court might be able to justify its dramatic forecast that foreign business entities will "look elsewhere." But no such evidence exists, and, on the contrary, history demonstrates that New York fared quite well before the FSIA was enacted and before courts began expanding their interpretation of the statute. Stripping away the public policy facade from *Weltover* leaves the impression that the answer to the "ultimate question" (would Congress want an American court to hear such a case?) would be different.

V. Conclusion

Like many FSIA cases, *Weltover, Inc. v. Republic of Argentina* struggles to interpret a statute which is well conceived but nebulously written. From the day the FSIA was enacted, courts have grappled with how to approach and interpret it. It is ironic that legislative intent seems to play such a key role in interpreting the statute¹⁰² even though the legislative intent behind the Act is unclear.

Exactly how far the "direct effect" clause of the FSIA should reach is a question which neither the courts nor Congress have successfully answered. Presumably the United States Supreme Court will attempt to clarify the remaining uncertainties surrounding the "direct effect" clause when it hears the *Weltover* appeal during the Court's 1992 term.¹⁰³

Essential to resolving the legal dispute in *Weltover* and similar "direct effect" cases is a clear locus of injury test. The Second Circuit's analysis of this issue was too simplistic.¹⁰⁴ The court seemed

pendence. . . . [T]he FSIA grants sovereign immunity in order to serve our larger interest in preserving international amity.
Callejo, 764 F.2d at 1112.

¹⁰¹ See *supra* note 97 and accompanying text.

¹⁰² The *Weltover* court regarded legislative intent as the "ultimate FSIA question." See *supra* note 97 and accompanying text.

¹⁰³ See *Republic of Argentina v. Weltover, Inc.*, 60 U.S.L.W. 3476 (U.S. Jan. 10, 1992) (No. 91-763). Oral argument is scheduled for the March session, which begins March 23, 1992.

¹⁰⁴ See *supra* notes 76-95 and accompanying text.

determined to honor its perception of congressional intent surrounding the FSIA by opening American courts to aggrieved foreign plaintiffs, but in doing so the court opened the doors too widely. United States courts should certainly adjudicate complaints which sufficiently implicate national or state interests, but American courts should not become a "clearing house" for international financial disputes which only marginally concern the United States. The plaintiffs in *Welltover* did not manifest themselves sufficiently in the United States such that any American or New York interests, other than the public policy concerns voiced by the *Welltover* court, were implicated.

The Second Circuit's consideration of public policy concerns was similarly short-sighted, for the court ignored possible public policy harms which might occur as a result of exercising jurisdiction over Argentina and other foreign sovereigns.¹⁰⁵ Without considering such conflicting issues a fair analysis is impossible.

In answering the "ultimate FSIA question,"¹⁰⁶ would Congress want an American court to entertain an action such as the one in *Welltover*, the Second Circuit Court of Appeals concluded that public policy considerations compel an affirmative response. However, the court failed to consider competing public policy concerns, and its locus of injury analysis of the "direct effect" clause oversimplified factors which courts must consider. By affirming the district court's exercise of subject matter jurisdiction with such far-reaching, general analysis, the Second Circuit takes a step in the wrong direction: it further obscures the scope of the FSIA, a statute which needs clarification above all else.

MATTHEW PATRICK MCGUIRE

¹⁰⁵ Possible negative ramifications include a "chilling effect" on foreign states' willingness to utilize the United States as a conduit or terminus for business relationships and transactions. See *supra* note 100 and accompanying text.

¹⁰⁶ See *supra* note 97 and accompanying text.

